No. 76321-6

SUPREME COURT OF THE STATE OF WASHINGTON

DAVID T. McDONALD, et al.,

Petitioners,

v.

SECRETARY OF STATE SAM REED, et al.,

Respondents

WASHINGTON SECRETARY OF STATE'S RESPONSE TO PETITIONERS' MOTION FOR EMERGENCY PARTIAL RELIEF

Thomas F. Ahearne, WSBA No. 14844
Jeffery A. Richard, WSBA No. 28219
Hugh D. Spitzer, WSBA No. 5827
Marco J. Magnano, WSBA No. 1293
SPECIAL ASSISTANT ATTORNEYS GENERAL*
Foster Pepper & Shefelman PLLC
1111 Third Avenue, suite 3400
Seattle, WA 98101-3299
Telephone: (206) 447-8934/447-4400
Telefax: (206) 749-1902/447-9700
E-mail: ahearne@foster.com

Attorneys for Respondent Secretary of State Sam Reed

Since the current Attorney General is one of the candidates in the election being recounted, the above private counsel (instead of the Attorney General's office) is representing the Secretary of State in this matter.

TABLE OF CONTENTS

Page

Table Of Authorities iv

I. SUMMARY 1

1. New or different rules cannot now be issued to govern the November 2 election. 1
2. A "recount" is not a re-examination of every ballot. 2
3. The elections statute does not grant observers the right assert objections during their observation 3
4. Petitioners' motion must be denied 4

II. ISSUES ADDRESSED 5

III. STATEMENT OF THE CASE 6

A. Washington Law In Place Before The November 2, 2004 Election. 6

1. Statewide Standards are Set Forth in the Washington Elections Statute and Washington Administrative Code. 6
2. Election "Canvassing" and County Canvassing Boards. 7
3. Election "Recounts". 8

B. The November 2, 2004 Election. 8

IV. LEGAL DISCUSSION 10

A. Petitioners' Claims Must Be Dismissed Because New Or Different Rules Cannot Now Be Issued To Govern The November 2 Election. 10

B. Petitioners' Claims Must Be Dismissed Because A "Recount" Is *Not* A Re-examination Of Every Ballot. 12

1. Petitioners have no *statutory* basis for their wholesale re-evaluation demand. 12
2. Petitioners' *constitutional* argument does not provide a basis for their wholesale re-evaluation demand. 15

(a) Uniform rule does not require identical results. 17

(b) Petitioners' signature rejection rate argument does not implicate equal protection clause. 18

(c) Washington law holds that different results do not implicate equal protection absent an improper intent to discriminate 20

Page

(d) Canvassing boards can address particular errors 22

C. Petitioners' Claims Must Be Dismissed Because Washington Law Does Not Allow Each Party's Observers To Lodge Objections During Their Observation Of The Ballots And Tabulation. 22

V. CONCLUSION 23

TABLE OF AUTHORITIES

Cases

Braxton v. Holmes County Election Canvassing Board,
870 So.2d 958 (Fla. Dist. Ct. App. 2004) 14

Brower v. State,
137 Wn.2d 44, 969 P.2d 45 (1998) 15

Bush v. Gore,
531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000)
..... 1, 4, 10-12, 15, 18-20, 24

Carkonen v. Williams,
76 Wn.2d 617, 458 P.2d 280 (1969) 20-21

Dowden v. Benham,
234 Ind. 103 (1955) 15

In re Lee Wee,
143 F. Supp. 736 (S.D. Cal. 1956) 18

Graham v. Reid,
779 N.E.2d 391, 334 Ill. App.3d 1017 (2002) 19-20

Lysogorski v. Charter Township of Bridgeport,
662 N.W.2d 108, 256 Mich.App. 297 (2003) 18

Morris v. Board of County Commissioners of Asotin County,
195 Wash. 173, 80 P.2d 414 (1938) 7

Nehme v. Immigration and Naturalization Serv.,
252 F.3d 415 (5th Cir. 2001) 17-18

O'Connell v. Meyers,
51 Wn.2d 454, 319 P.2d 828 (1957) 10

Quigley v. Phelps,
74 Wash. 73, 132 P. 738 (1913) 12

Southwest Voter Registration Education Project v Secretary of State Shelley,
344 F.3d 914 (9th Cir. 2003) 19

State ex rel. Thomas v. District Court,
154 P.2d 980 (Mont. 1945) 14

State v. Oksoktaruk,
70 Wn. App. 768, 856 P.2d 1099 (1993) 17

State v. Superior Court of King County,
113 Wn. 54, 193 P. 226 (1920) 12, 23

Statutes

Chapter 29A.64 RCW 9
Chapter 34.05 RCW 6
Chapter 42.30 RCW 22
Laws of 1991, c. 90, §1 24
RCW 29A.04.013 ..... 7, 12
RCW 29A.04.019 13
RCW 29A.04.139 ..... 8, 13, 14
RCW 29A.04.610 6
RCW 29A.04.611 6
RCW 29A.40.110 ..... 3, 16
RCW 29A.60.140 7
RCW 29A.60.210 ..... 3, 11, 22
RCW 29A.60.250 7
RCW 29A.64.041 ..... 4, 7, 22, 23
RCW 29A.64.070 13
Title 29A RCW 4, 6, 10, 18, 23

Washington Administrative Code ("WAC") Provisions

Title 434 WAC 6, 18
WAC 434-253-047 ..... 2, 10, 16

Other Authorities

CJS Elections, §289 ..... 12, 23
Ill. Comp Stat. §5/24A-15/1 (2004) 13
4 E. McQuillin, *The Law of Municipal Corporations*
§13.07 (3rd Ed. 2002) 23, 24
Fla. Stat. Section 102.168(3)(c) (2000) 14
W.Va.Code §3-4A-28(3) (2004) 14
Wis. Stat. §5.90 (2004) 14

I. SUMMARY

Petitioners request "emergency partial relief" that would in essence order the Secretary of State to require the 39 County Auditors conducting the upcoming hand recount to (1) re-examine every ballot accepted and rejected in earlier counts, and (2) allow each party to have an observer see each ballot as it is being counted and assert objections while each such ballot is being counted.

This is the Washington Secretary of State's Response.

1. New or different rules cannot now be issued to govern the November 2 election.

As Part IV.A of this Response explains, petitioners fail to establish that Washington law grants the Secretary of State the legal authority to require the 39 counties to do what petitioners demand.

Washington law authorizes the Secretary of State to promulgate statewide rules before an election is held to facilitate the County Auditors' conduct of that election. In this case, the Secretary of State did that. And as the *Bush v. Gore* case cited by petitioners makes clear, a State's pre-election rules cannot be changed or supplemented with new rules after the election occurs. This point is fatal to petitioners' demand that the Secretary of State (or this Court) now create new rules to govern the hand recount of last month's November 2 election.

After an election is held, Washington law provides for each county's canvassing board to examine that county's ballots, tabulate that county's votes, and certify that county's results. The Secretary of State

cannot usurp or overrule the county canvassing board's decisions with new post-election mandates.

2. A "recount" is not a re-examination of every ballot.

As Part IV.B of this Response explains, petitioners' demand for a blanket re-examination of all ballots during the upcoming recount does not have a valid ***statutory*** basis.

Washington's election statute provides that the examination of ballots and tabulation of votes is part of the "canvassing" of an election.

The upcoming hand recount, however, is not a recanvass.

It's a recount.

And the Washington statute's definition of a "recount" expressly provides only for the retabulation of ballots – not a re-examination of them. Washington's election statute simply is not the same as the statutes of other States noted in petitioners' brief which provide for a re-examination or recanvass of the ballots instead of a recount.

Nor is a blanket re-examination of every ballot required as a ***constitutional*** matter. Despite petitioners' implications to the contrary, Washington had uniform statewide standards in place for the examination of ballots as part of the county canvassing boards' canvassing of the November 2 election. For example, petitioners' own motion acknowledges that Washington law provided the following "match" and "same as" requirements for signatures:

> a provisional ballot must be canvassed for a signature that "matches a voter registration record," WAC 434-253-047, and an absentee ballot must be examined to "verify that the

> voter's signature on the return envelope is the same as the signature of that on the voter registration." RCW 29A.40.110.

Petitioners' Motion at 17 n.3 (footnote runs on to p. 18) (emphasis added).

Petitioners' real complaint is that they disagree with the decisions of some county canvassing boards under those statewide standards. For example, they complain that some counties effectively employed a laxer signature verification system than others when applying the statewide requirement that the signature on a voter's ballot must "match" or be "the same as" the voter's signature on file.

To the extent petitioners timely brought forward evidence of an unlawful inconsistency or error that resulted in a valid ballot not being counted, RCW 29A.60.210 in the Washington elections statute provides a safety valve for each county's canvassing board to correct such a timely raised and identified error. That limited safety valve for a particularly identified error, however, is not a floodgate requiring the wholesale recanvass of all ballots to see if perhaps any errors with respect to any of the ballots might possibly have occurred. There simply is no constitutional or statutory bases for petitioners' demand that the "recount" prescribed by the Washington legislature now be expanded to include, for example, a wholesale re-examination of signature verification issues previously submitted to and ruled upon by the county canvassing boards.

3. The elections statute does not grant observers the right assert objections during their observation.

The Washington elections statute allows witnesses in a recount to "observe the ballots and the process of tabulating the votes".

RCW 29A.64.041(1). Like the Washington Open Public Meetings Act, however, that statutory right does not include a right to also "be heard" or otherwise participate in the process being observed. As Part IV.C of this Response explains, petitioners' Motion does not provide any valid legal authority for this Court to now re-write the Washington elections statute to add such privileges beyond the statutory right to observe a recount as prescribed by the legislature.

4. Petitioners' motion must be denied.

Petitioners' own quotation from *Bush v. Gore* accurately acknowledges that "the right to vote as the legislature has prescribed is fundamental." Petitioners' Motion at 10 (emphasis added). The elections law treatise petitioners cite at page 14 of their Motion further explains with respect to recounts that "The right to a recount ... did not exist at common law, and the grant of the right lies within the discretion of the legislature" (emphasis added).

In this case, our legislature has prescribed those rights in Title 29A RCW. The provisions enacted by the Washington legislature provide for a "recount" (not a "recanvass") of the ballots, and provide for the political parties' witnesses to observe (not lodge objections to) the ballots as they are being recounted. Neither the Washington elections statute nor the constitutional arguments petitioners raise justify petitioners' demand that this Court issue an Order that effectively re-writes the Washington elections statute to provide for more than what the legislature has prescribed.

The Washington Secretary of State accordingly requests that this Court deny the petitioners' motion, and allow the upcoming hand recount to promptly proceed without litigation uncertainty or delays so the People of our State can have a closure to this statutory recount process.

II. ISSUES ADDRESSED

The "Summary Of Analysis" section of petitioners' motion specifies the emergency relief petitioners seek – namely:

> (1) "an Order from this Court requiring that the pending hand recount include a consideration of all votes cast, including those rejected by canvassing boards or their subordinates during the initial count", and that this Court's Order include "standards that ensure that all ballots rejected in previous counts are fully canvassed so that the hand recount produces as complete and accurate a tabulation as possible, [and] standards for evaluating previously-rejected signatures according to the more liberal standards applied in most counties"; and
>
> (2) "that this Court Order the Secretary of State to issue uniform statewide rules for the conduct and procedure of the hand recount consistent with the rights of observation and challenge and sufficient to ensure that all votes are counted", with "standards that allow party representatives to meaningfully witness the hand recount, by observing all actual ballots being counted."

Petitioners' Motion at pages 7 – 8.

As the rest of this Response explains, the legal authority petitioners invoke does not support the above relief they request.

III. STATEMENT OF THE CASE

A. Washington Law In Place Before The November 2, 2004 Election.

1. Statewide Standards are Set Forth in the Washington Elections Statute and Washington Administrative Code.

As Part IV of this Response sets forth in more detail, the Washington elections statute (Title 29A RCW) prescribes statewide standards and rules with respect to the conduct of elections in our State.

The Washington elections statute also provides for the Secretary of State to make "reasonable rules in accordance with chapter 34.05 RCW [the Administrative Procedures Act] ... to effectuate any provision of this title and to facilitate the execution of its provisions in an orderly, timely, and uniform manner". RCW 29A.04.610, .611. Pursuant to that authority, the Secretary of State has promulgated a large volume of statewide standards and rules concerning the conduct of elections in our State (see Title 434 WAC). As Part IV of this Response also explains, the WAC provisions at issue in this case were so promulgated before the November 2, 2004 election.

The recount guidelines that the petitioners' motion refers to as "final rules" issued or adopted by the Secretary of State, however, were not rules promulgated, issued, or adopted as the petitioners' suggest. Indeed, those guidelines expressly stated that they were not new law, that they did not in any way change the statewide standards established before

the election, and that they were merely a recitation of current law to assist the County Auditors.[1]

2. Election "Canvassing" and County Canvassing Boards.

The Washington elections statute defines "canvassing" as follows:

> "Canvassing" means the process of examining ballots or groups of ballots, subtotals, and cumulative totals in order to determine the official returns of a primary or general election and includes the tabulation of any votes that were not tabulated at the precinct or in a counting center on the day of the primary or election.

RCW 29A.04.013.

The Washington elections statute assigns to county canvassing boards the duties of so canvassing election results and, in the event of a recount, retabulating ballots and producing amended election returns based on that retabulation. RCW 29A.60.140, 29A.64.041. Each county's canvassing board consists of the following three persons (or their designees): the County Auditor, the County Prosecuting Attorney, and the chair of the County's legislative body. RCW 29A.60.140.

A court can compel a canvassing board to make a canvass of the returns or conduct a recount, but can go no further in directing how the canvassing board shall act as long as it proceeds according to the directions of the statute. *Morris v. Board of County Commissioners of Asotin County*, 195 Wash. 173, 177-178, 80 P.2d 414 (1938) ("The court is without power to inquire into the [canvassing] boards' manner in arriving at the result").

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[1] *Declaration Of Jeffery Richard, Exhibit A.*

Although the Secretary of State certifies the results of the election to the Governor, Legislature, and the public (RCW 29A.60.250), the Secretary of State does not intervene, approve, or disapprove the decisions of the county canvassing boards.

3. Election "Recounts".

The Washington elections statute defines a "recount" as follows:

> "Recount" means the process of retabulating ballots and producing amended election returns based on that retabulation, even if the vote totals have not changed.

RCW 29A.04.139.

Since "recount" is prescribed by statute to be narrower than "canvassing", the recounts conducted in prior years under the Washington elections statute have not entailed a recanvassing of the election.[2] Thus, as the declaration submissions filed with this Response explain, the historical recount practice under our State's elections statute has been to not conduct canvassing activities such as a wholesale re-examination of ballot signatures previously submitted to and ruled upon by the county canvassing boards.[3]

B. The November 2, 2004 Election.

The general election in our State was held on November 2, 2004. The Secretary of State certified the results of that election on November 17.

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[2] *Declaration Of Jeffery Richard, Exhibit B.*

[3] *Declaration Of Jeffery Richard, Exhibit B.*

The margin separating the two top candidates for Governor triggered an automatic machine recount under chapter 29A.64 RCW, and the Secretary of State certified the results of that machine recount on November 30.

On December 3 one of the petitioners in this action requested a hand recount, and pursuant to the schedule that the Secretary of State had been previously announced to the political parties and all County Auditors, the Secretary of State issued the recount directive on December 6.[4]

The Secretary of State advised the County Auditors of the petitioners' Motion and the initial indication in the email this Court sent with its December 3 briefing Order that indicated a hearing might be held on petitioners' Motion December 8 or 9, and requested that the counties not commence the actual process of recounting the ballots until December 9 (the end of the 3-day delay allowed by statute for the counties to commence the recount). As of the time this Response is being typed, the Secretary of State has been informed by some counties that they will be commencing on December 8, and others that they will delay until December 9.[5]

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[4] *Declaration Of Jeffery Richard, Exhibit A.*

[5] *Declaration Of Jeffery Richard, Exhibit A.*

IV. LEGAL DISCUSSION

A. Petitioners' Claims Must Be Dismissed Because New Or Different Rules Cannot Now Be Issued To Govern The November 2 Election.

Washington law authorizes the Secretary of State to promulgate statewide rules before an election is held to facilitate the County Auditors' conduct of that election. See *O'Connell v. Meyers*, 51 Wn.2d 454, 460, 319 P.2d 828 (1957) (Secretary of State's statutory duties must be performed prior to the election).

And in this case, that is precisely what the Secretary of State did. For example, promulgating WAC provisions requiring the signature on a provisional ballot to "match" the signature on file with the County Auditor.[6] Such rules promulgated in accordance with the Washington Administrative Procedures Act supplemented the election requirements prescribed by the legislature in Title 29A RCW.

The *Bush v. Gore* case petitioners invoke for their constitutional argument confirms that a State Supreme Court cannot now change those rules or impose new rules to govern the counting of the previously cast November 2 ballots. As Chief Justice Rehnquist's opinion in support of the Court's ruling explained when discussing the new "undervote" counting practice which the Florida Supreme Court had added to supplement the Florida Secretary of State's pre-election practices:

> For the [Florida Supreme] court to step away from this established practice, prescribed by the Secretary, the state official charged by the legislature with "responsibility to ...

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[6] *WAC 434-253-047 (as amended by emergency rule WRS 04-18-028, effective August 24, 2004).*

> obtain and maintain uniformity in the application, operation, and interpretation of the election laws," ... was to depart from the legislative scheme.

531 U.S. at 120.

Petitioners' demand that this Court now create new or different rules to govern the tabulation of last November's election similarly depart improperly from the Washington election statute's legislative scheme.

Indeed, the Court's injection of such new rules at this point would not only depart from the Washington election statute's legislative scheme – it would violate it. That is because Washington's election statute provides that after the ballots are cast in an election, it is the county canvassing board's role to examine the ballots and tabulate the votes under the law existing at the time those ballots were cast. See Part III.A.2 of this Response above.

If someone believes that there is an inconsistency or discrepancy in the way the county canvassing board is tabulating any particular ballot in the performance of that function, that person must timely bring the alleged inconsistency or discrepancy to the county canvassing board's attention so it can, pursuant to the safety valve provided by RCW 29A.60.210, correct any error the canvassing board finds with respect to that particular ballot before the county canvassing board certifies the results of its tabulation of its county's election results. Under our State's elections laws, that person cannot instead run to this Court demanding that every county canvassing

board undertake a wholesale recanvassing of all ballots cast in the election.[7]

B. Petitioners' Claims Must Be Dismissed Because A "Recount" Is *Not* A Re-examination Of Every Ballot.

1. Petitioners have no *statutory* basis for their wholesale re-evaluation demand.

The legal authority upon which petitioners rely confirms that the right to vote as the legislature has prescribed is fundamental,[8] and that since the right to a recount did not exist at common law, the grant of the right lies within the discretion of the legislature."[9] In short, the upcoming hand recount at issue in this case is purely statutory. See also, e.g., *State v. Superior Court of King County*, 113 Wn. 54, 57, 193 p. 226 (1920) (right to vote is constitutional right, but manner in which franchise is to be exercises is purely statutory); *Quigley v. Phelps*, 74 Wash. 73, 85, 132 P. 738 (1913) (in the absence of statutory authority, where election officers have performed their duty in counting the ballots and have certified their return indicating the result of the election, they are without authority thereafter to do any act that would operate to change the result originally announced by them).

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[7] *Respondent further notes that petitioners' claim that this Court has proper mandamus jurisdiction in this case (Petitioners' Motion at 9 & n.2) is misplaced, for the mandamus "order" petitioners demand is not ministerial in nature.*

[8] *Petitioners' Motion at 10 (quoting from Bush v. Gore, 531 U.S. 98, 104, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000), that "the right to vote as the legislature has prescribed is fundamental") (emphasis added).*

[9] *Petitioners' Motion at 14 cites §289 of the CJS Elections treatise. That §289 confirms that "The right to a recount and contest of the ballots cast at an election did not exist at common law, and the grant of the right lies within the discretion of the legislature." CJS Elections, §289 (emphasis added).*

The statutory basis for recounts is fatal to petitioners' demand that the upcoming hand recount include a re-examination of every ballot – for the Washington election statute provides that a "recount" is merely a re-tabulation of the ballots, not a re-evaluation of them.

Our election statute defines "canvassing" relatively broadly to encompass both the examination of ballots *and* the tabulation of their votes:

> "Canvassing" means the process of examining ballots or groups of ballots, subtotals, and cumulative totals in order to determine the official returns of a primary or general election and includes the tabulation of any votes that were not tabulated at the precinct or in a counting center on the day of the primary or election.

RCW 29A.04.013.

In contrast, our election statute defines a "recount" much more narrowly, specifying that a recount is merely the retabulation of ballots:

> "Recount" means the process of retabulating ballots and producing amended election returns based on that retabulation, even if the vote totals have not changed.

RCW 29A.04.139.

The fact that "canvassing" and "counting" are not the same is further recognized throughout the Washington elections statute. E.g., RCW 29A.04.019 (describing county counting centers as the facility designated to "*count* and *canvass*" ballots); RCW 29A.64.070 ("After the original *count*, *canvass*, and certification of results, the votes cast in any single precinct may not be *recounted* and their results recertified more than twice").

Washington's election statute simply is not the same as the statutes of other States noted in petitioners' brief which provide for a recanvass or re-evaluation of the ballots instead of a just a recount. For example:

- the West Virginia recount statute cited by petitioners states that "the ballots and ballot cards shall be reexamined during such recount";[10]
- the Illinois recount statute they cite requires not just a retabulation, but also that ballots previously marked as rejected "shall be examined to determine the propriety of such labels";[11] and
- the Wisconsin recount statute they cite requires not just a retabulation of votes, but that "In addition, the board of canvassers ... shall examine the ballots marked 'rejected', 'defective' and 'objected to' to determine the propriety of such labels".[12]

Petitioners' invocation of out-of-State cases to argue that Washington's recount statute should be "liberally" construed simply cannot change the fundamental fact that the Washington recount statute does not include a re-examination of ballots as part of a recount, and this Court cannot re-write the Washington statute to add the ballot re-examination provisions that petitioners like in other State's statutes.[13]

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[10] *W.Va.Code §3-4A-28(3) (2004), as cited at page 15 of Petitioners' Motion.*

[11] *Ill. Comp Stat. §5/24A-15/1 (2004), as cited at pages 14-15 of Petitioners' Motion.*

[12] *Wis. Stat. §5.90 (2004), cited at page 15 of Petitioners' Motion.*

[13] *Petitioners' cases from other States are also inapplicable to this situation for other reasons as well.*

For example, petitioners cite Braxton v. Holmes County Election Canvassing Board, 870 So.2d 958 (Fla. Dist. Ct. App. 2004), for the proposition that reconsideration of ballots rejected by the canvassing board because of signature issues is permitted in a recount. However, Braxton was not a recount case. It was an election challenge case, and under Florida law, "rejection of a number of legal votes sufficient to change or place in doubt the result of the election, is grounds for contesting the results of an election. Fla. Stat. Section 102.168(3)(c) (2000).

As another example, petitioners cite to two out of state cases for their assertion that recount procedures must be construed liberally. But neither case pertained to the scope

2. Petitioners' *constitutional* argument does not provide a basis for their wholesale re-evaluation demand.

Petitioners allege they have identified what they believe are instances of inconsistencies, discrepancies, and errors, and then argue those inconsistencies, discrepancies, and errors prove there is not a uniform standard for the evaluation of ballots in Washington. Invoking the equal protection theme of *Bush v. Gore*, petitioners argue that a blanket re-examination of every ballot is therefore required as a ***constitutional*** matter because the federal and Washington State constitutions require a uniform standard for the evaluation of ballots.

As an initial matter, this Respondent notes that petitioners' citation of *Brower v. State*, 137 Wn.2d 44, 969 P.2d 45 (1998), at page 11 of their brief does not support their suggestion that the Washington Constitution grants greater equal protection rights in this context than the federal constitution's equal protection rights recognized in *Bush v. Gore*. And as explained below, petitioners' constitutional argument under that case's equal protection ruling fails.

Petitioners' essential equal protection premise is that Washington did not have uniform statewide standards for the examination of ballots as part of the county canvassing boards' canvassing of the November 2 election. But that premise is not accurate.

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of counting or canvassing under which a recount would operate. State ex rel. Thomas v. District Court, 154 P.2d 980, 981 (Mont. 1945), pertained simply to whether the court should grant or deny the application for recount. And Dowden v. Benham, 234 Ind. 103 (1955), was an election contest challenging the results of an election.

For example, the Washington election statute provided a single, uniform statewide standard for accepting the signature on an absentee ballot – i.e., the ballot signature must be the "same as" the one on file:

> Before opening a returned absentee ballot, the canvassing board or its designated representatives ... shall verify that the voter's signature on the return envelop is the same as the signature of that voter in the registration files of the county.

RCW 29A.40.110.

And the Washington Administrative Code provided a single, uniform statewide standard for accepting the signature on a provisional ballot – i.e., the ballot signature must "match" the one on file:

> A provisional ballot cannot be counted unless the voter's ... signature ... matches a voter registration record.

WAC 434-253-047 (as amended by emergency rule WRS 04-18-028, effective August 24, 2004).

Petitioners argue that the "match" requirement for provisional ballot signatures could not have constituted a uniform standard because different counties had different rejection rates under that "match" standard. And petitioners suggest a similar argument against the "same as" requirement for absentee ballot signatures based on different counties' differing rejection rates.

But different county canvassing boards' reaching different conclusions does not prove that the Washington elections law provided the canvassing boards with no statewide standard. It simply means they reached different conclusions. And despite petitioners' complaints about King County employing a signature verification system that they assert is

not as lax other counties, petitioners do not identify instances where King County's signature verification system caused a valid ballot to be rejected.

(a) Uniform rule does not require identical results.

Having a sufficiently uniform rule to comply with constitutional equal protection concerns does not require identical results.

For example, the fact that a trial court in one county imposes a different sentence under the Washington Sentencing Reform Act than the sentence imposed by the trial court in another county does not mean that Washington lacks a uniform standard compliant with constitutional equal protection concerns. See *State v. Oksoktaruk*, 70 Wn. App. 768, 776-77, 856 P.2d 1099 (1993) (there is no constitutional requirement that defendants with the exact same "offender score" convicted under similar circumstances must also receive the same sentence, for sentencing disparities between similar crimes do not implicate equal protection).

The "accident of geography" cases in the citizenship/naturalization context provides another example of how different results do not establish the lack of a uniform rule compliant with equal protection. Although the law requires a uniform federal standard for naturalization must apply with equal force in every state, that uniformity rule only requires the same general standard be applied – it does not require the same result. *Nehme v. Immigration and Naturalization Service*, 252 F.3d 415, 429 (5th Cir. 2001). Therefore, a person living in one State may be entitled to naturalization whereas that same person living in another State would not be entitled to naturalization simply because that accident of geography –

for "the Constitution simply requires Congress to enact rules of naturalization that apply uniformly throughout the United States, even though those uniform federal rules may produce results that differ by state." 252 F.3d at 429. See also *In re Lee Wee*, 143 F. Supp. 736, 737-38 (S.D. Cal. 1956) (discussing the "good moral character" requirement for citizenship, and holding that the law was uniform even though a person who lived in a city where gambling was permitted might be entitled to naturalization, whereas in another city in the same State, gambling could result in a criminal conviction and a denial of citizenship).

In short, petitioners' contention that they believe different counties arrive at different results in similar situations does not refute the dispositive fact that Title 29A RCW and Title 434 WAC provide sufficiently uniform elections standards as far as the equal protection clause is concerned.

(b) Petitioners' signature rejection rate argument does not implicate equal protection clause.

Petitioners' complaint that different counties have a different verification system for "matching" signatures does not rise to an equal protection violation under petitioners' own case precedent of *Bush v. Gore* – for in that case the U.S. Supreme Court specifically noted that its ruling was not addressing the question of "whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." 531 U.S. at 109. See also 531 U.S. at 147 (Justice Breyer's discussion noting that punch-card systems failed to read a vote on the

ballot 1.53% of the time, while optical scan systems failed to read a vote on the ballot only 0.3% of the time – and noting those differing results did not rise to the level of an equal protection violation even though "the ballots of voters in counties that use punchcard systems are more likely to be disqualified than those in counties using optical-scanning systems").

Case law after *Bush v. Gore* has thus confirmed that different counties having different systems that result in a different rejection rate for ballots does not raise a sufficient equal protection claim for court intervention.

Much like the petitioners in this case, the plaintiffs in the Gray Davis Recall case complained that different counties had different systems which resulted in some counties rejecting far more votes than other counties. Specifically, plaintiffs noted that California counties using a punch-card system rejected 2.23% of ballots cast, which was twice the rejection rate experienced by areas using other systems. *Southwest Voter Registration Education Project v Secretary of State Shelley*, 344 F.3d 914, 917 (9th Cir. 2003).

Plaintiffs claimed an equal protection violation because voters in counties that used one system (punch-cards) had a clearly lower chance of having their votes counted than voters in counties that used other systems. *Id.* But the Ninth Circuit explained that *Bush v. Gore* did not prohibit local entities from developing different systems for implementing elections, and thus rejected plaintiffs' demand that the court intercede on equal protection grounds. *Id.* Cf. *Graham v. Reid*, 779 N.E.2d 391, 395,

334 Ill. App.3d 1017 (2002) (ballots in one precinct not being counted because they were missing did not violate the equal protection rights of that precinct's voters).

The same conclusion applies here. Even if petitioners established that the difference in rejection rates they complain about was caused by Washington counties' using different systems for verifying a signature "match" (instead of being caused by other likely variables[14]), such a difference in rejection rates due to the local jurisdictions' developing different systems for signature verification still would not implicate the equal protection ruling in *Bush v. Gore*.

(c) Washington law holds that different results do not implicate equal protection absent an improper intent to discriminate

Washington law further confirms that even if petitioners had proven that the counties having different signature verification systems caused the different rejection rates they complain about, that different result would not rise to the level of an equal protection violation unless petitioners also proved some improper intent to discriminate between the "accepted" and "rejected" voters.

For example, the taxpayers in *Carkonen v. Williams*, 76 Wn.2d 617, 458 P.2d 280 (1969), alleged that the cyclical property tax assessment system used by King and Snohomish counties lacked uniformity within and between the two counties, thereby giving rise to unequal and

[14] *Such other variables are noted at Declaration Of Jeffery Richard, Exhibit C.*

nonuniform tax exactions in violation of the equal protection clauses of the federal and state constitutions.

The unequal and nonuniform result inherent in such cyclical systems was not disputable. This Court nonetheless rejected the taxpayers' equal protection claim, concluding that "state courts which have considered cyclical revaluation programs have generally found them to be compatible with constitutional equal protection and uniformity provisions, provided that they be carried out systematically and without intentional discrimination." 76 Wn.2d at 633.

As this Court further explained that "the assessors involved were honestly endeavoring to pursue a systematic nondiscriminatory cyclical approach to revaluation", and that the "sheer physical problem of annually inspecting the units of property involved, coupled with the staff and budgetary allocations required to accomplish such, lend wisdom to the legislative act authorizing and directing a cyclical approach, and virtually lays to rest any viable claim to intentional discrimination inhering in the system." 76 Wn.2d at 632.

Here, petitioners do not even allege – never mind establish – any such intentional discrimination inhering in the differing signature verification systems they complain about. Their equal protection argument accordingly does not justify the extraordinary Court intervention that petitioners demand.

(d) Canvassing boards can address particular, timely raised errors

To the extent petitioners timely brought forward evidence of an unlawful inconsistency or error with respect to any particular ballot, the Washington elections statute provided a safety valve for the appropriate county's canvassing board to correct such an error, expressly providing that:

> Whenever the canvassing board finds that there is an apparent discrepancy or an inconsistency in the returns of a primary or election, the board may recanvass the ballots or voting devices in any precincts of the county. The canvassing board shall conduct any necessary recanvass activity on or before the last day to certify the primary or election and correct any error and document the correction of any error that it finds.

RCA 29A.60.210.

Especially in light of that additional safeguard, petitioners cannot in this case establish the constitutional basis they claim for this Court to step in and rewrite the Washington elections statute to change its provision for a "recount" to instead provide for a wholesale "reevaluation" and "recanvassing" of all ballots instead.

C. Petitioners' Claims Must Be Dismissed Because Washington Law Does Not Allow Each Party's Observers To Lodge Objections During Their Observation Of The Ballots And Tabulation.

The Washington elections statute allows witnesses in a recount to "observe the ballots and the process of tabulating the votes". RCW 29A.64.041(1).

Like the Washington Open Public Meetings Act, however, that statutory right does not also include a right to "be heard" or participate in

the process being observed. See chapter 42.30 RCW (the Open Public Meetings Act).[15]

The petitioners, moreover, have not identified any county that plans to refuse to allow the petitioners' observers to communicate with or "be heard" by the county's supervisory personnel involved in the upcoming recount.

In short, petitioners' motion does not provide any statutory or constitutional authority for this Court to now re-write the Washington elections statute to add provisions or privileges beyond the parties' statutory right to observe as prescribed in RCW 29A.64.041.

V. CONCLUSION

The right to a recount is prescribed by the statute creating that right. And Washington's statute limits recounts to a recount – not the reexamination or recanvassing of all ballots as petitioners demand.

Washington's recount statute is thus narrower than the recount statutes of other States. And as the Washington legislature has confirmed, our recount statute's more limited process is designed to strike what the legislature determined to be the appropriate balance for a proper and expeditious closure to close election contests:

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[15] *The Open Public Meetings Act does not guarantee the right of the public to* ***participate*** *at the meeting attended – it only guarantees that the public can attend. See 4 E. McQuillin,* The Law of Municipal Corporations *§13.07 (3rd Ed. 2002); Lysogorski v. Charter Township of Bridgeport, 662 N.W.2d 108, 110, 256 Mich.App. 297 (2003) ("The public's right to attend a meeting of a public body is limited to the right to observe and hear the proceedings so that they may be informed of the manner in which decisions affecting them as citizens are made").*

> The legislature finds that it is in the public interest to determine the winner of close contests for elective offices as expeditiously and as accurately as possible. It is the purpose of this act to provide procedures which promote the prompt and accurate recounting of votes for elective offices and which provide closure to the recount process.

Laws of 1991, chapter 90, §1.

The provisions accordingly enacted by the Washington legislature provide for a "recount" (not a "recanvass" or "reexamination") of the ballots, and provide for the political parties' witnesses to observe (not lodge objections to) the ballots as they are being recounted. Neither the Washington elections statute nor the *Bush v. Gore* equal protection argument petitioners raise justify petitioners' demand that this Court issue an Order that effectively re-writes the Washington elections statute to provide for something other than what the Washington legislature has deliberately prescribed.

The Washington Secretary of State accordingly requests that this Court deny petitioners' motion, dismiss petitioners' suit, and allow the upcoming hand recount to promptly proceed without litigation uncertainties and delays so the People of our State can have closure to this recount process.

RESPECTFULLY SUBMITTED this 7th day of December, 2004.

Foster Pepper & Shefelman PLLC
SPECIAL ASSISTANT ATTORNEYS GENERAL*

Thomas F. Ahearne, WSBA No. 14844
Jeffery A. Richard, WSBA No. 28219
Hugh D. Spitzer, WSBA No. 5827
Marco J. Magnano, WSBA No. 1293

Attorneys for Respondent Secretary of State Sam Reed

**Since the current Attorney General is one of the candidates in the election being recounted, the above private counsel (instead of the Attorney General's office) is representing the Secretary of State in this matter*

TABLE OF CONTENTS

Page

Table Of Authorities iv

I. SUMMARY 1

1. New or different rules cannot now be issued to govern the November 2 election. 1
2. A "recount" is not a re-examination of every ballot. 2
3. The elections statute does not grant observers the right assert objections during their observation 3
4. Petitioners' motion must be denied 4

II. ISSUES ADDRESSED 5

III. STATEMENT OF THE CASE 6

A. Washington Law In Place Before The November 2, 2004 Election. 6
1. Statewide Standards are Set Forth in the Washington Elections Statute and Washington Administrative Code. 6
2. Election "Canvassing" and County Canvassing Boards. 7
3. Election "Recounts". 8

B. The November 2, 2004 Election. 8

IV. LEGAL DISCUSSION 10

A. Petitioners' Claims Must Be Dismissed Because New Or Different Rules Cannot Now Be Issued To Govern The November 2 Election. 10

B. Petitioners' Claims Must Be Dismissed Because A "Recount" Is *Not* A Re-examination Of Every Ballot. 12
1. Petitioners have no *statutory* basis for their wholesale re-evaluation demand. 12
2. Petitioners' *constitutional* argument does not provide a basis for their wholesale re-evaluation demand. 15
(a) Uniform rule does not require identical results. 17
(b) Petitioners' signature rejection rate argument does not implicate equal protection clause. 18
(c) Washington law holds that different results do not implicate equal protection absent an improper intent to discriminate 20

Page

(d) Canvassing boards can address particular errors 22

C. Petitioners' Claims Must Be Dismissed Because Washington Law Does Not Allow Each Party's Observers To Lodge Objections During Their Observation Of The Ballots And Tabulation. 22

V. CONCLUSION 23

I. SUMMARY

Petitioners request "emergency partial relief" that would in essence order the Secretary of State to require the 39 County Auditors conducting the upcoming hand recount to (1) re-examine every ballot accepted and rejected in earlier counts, and (2) allow each party to have an observer see each ballot as it is being counted and assert objections while each such ballot is being counted.

This is the Washington Secretary of State's Response.

1. New or different rules cannot now be issued to govern the November 2 election.

As Part IV.A of this Response explains, petitioners fail to establish that Washington law grants the Secretary of State the legal authority to require the 39 counties to do what petitioners demand.

Washington law authorizes the Secretary of State to promulgate statewide rules before an election is held to facilitate the County Auditors' conduct of that election. In this case, the Secretary of State did that. And as the *Bush v. Gore* case cited by petitioners makes clear, a State's pre-election rules cannot be changed or supplemented with new rules after the election occurs. This point is fatal to petitioners' demand that the Secretary of State (or this Court) now create new rules to govern the hand recount of last month's November 2 election.

After an election is held, Washington law provides for each county's canvassing board to examine that county's ballots, tabulate that county's votes, and certify that county's results. The Secretary of State

cannot usurp or overrule the county canvassing board's decisions with new post-election mandates.

2. A "recount" is not a re-examination of every ballot.

As Part IV.B of this Response explains, petitioners' demand for a blanket re-examination of all ballots during the upcoming recount does not have a valid ***statutory*** basis.

Washington's election statute provides that the examination of ballots and tabulation of votes is part of the "canvassing" of an election.

The upcoming hand recount, however, is not a recanvass.

It's a recount.

And the Washington statute's definition of a "recount" expressly provides only for the retabulation of ballots – not a re-examination of them. Washington's election statute simply is not the same as the statutes of other States noted in petitioners' brief which provide for a re-examination or recanvass of the ballots instead of a recount.

Nor is a blanket re-examination of every ballot required as a ***constitutional*** matter. Despite petitioners' implications to the contrary, Washington had uniform statewide standards in place for the examination of ballots as part of the county canvassing boards' canvassing of the November 2 election. For example, petitioners' own motion acknowledges that Washington law provided the following "match" and "same as" requirements for signatures:

> a provisional ballot must be canvassed for a signature that "matches a voter registration record," WAC 434-253-047, and an absentee ballot must be examined to "verify that the

> voter's signature on the return envelope is the same as the signature of that on the voter registration." RCW 29A.40.110.

Petitioners' Motion at 17 n.3 (footnote runs on to p. 18) (emphasis added).

Petitioners' real complaint is that they disagree with the decisions of some county canvassing boards under those statewide standards. For example, they complain that some counties effectively employed a laxer signature verification system than others when applying the statewide requirement that the signature on a voter's ballot must "match" or be "the same as" the voter's signature on file.

To the extent petitioners timely brought forward evidence of an unlawful inconsistency or error that resulted in a valid ballot not being counted, RCW 29A.60.210 in the Washington elections statute provides a safety valve for each county's canvassing board to correct such a timely raised and identified error. That limited safety valve for a particularly identified error, however, is not a floodgate requiring the wholesale recanvass of all ballots to see if perhaps any errors with respect to any of the ballots might possibly have occurred. There simply is no constitutional or statutory bases for petitioners' demand that the "recount" prescribed by the Washington legislature now be expanded to include, for example, a wholesale re-examination of signature verification issues previously submitted to and ruled upon by the county canvassing boards.

3. The elections statute does not grant observers the right assert objections during their observation.

The Washington elections statute allows witnesses in a recount to "observe the ballots and the process of tabulating the votes".

RCW 29A.64.041(1). Like the Washington Open Public Meetings Act, however, that statutory right does not include a right to also "be heard" or otherwise participate in the process being observed. As Part IV.C of this Response explains, petitioners' Motion does not provide any valid legal authority for this Court to now re-write the Washington elections statute to add such privileges beyond the statutory right to observe a recount as prescribed by the legislature.

4. Petitioners' motion must be denied.

Petitioners' own quotation from *Bush v. Gore* accurately acknowledges that "the right to vote as the legislature has prescribed is fundamental." Petitioners' Motion at 10 (emphasis added). The elections law treatise petitioners cite at page 14 of their Motion further explains with respect to recounts that "The right to a recount ... did not exist at common law, and the grant of the right lies within the discretion of the legislature" (emphasis added).

In this case, our legislature has prescribed those rights in Title 29A RCW. The provisions enacted by the Washington legislature provide for a "recount" (not a "recanvass") of the ballots, and provide for the political parties' witnesses to observe (not lodge objections to) the ballots as they are being recounted. Neither the Washington elections statute nor the constitutional arguments petitioners raise justify petitioners' demand that this Court issue an Order that effectively re-writes the Washington elections statute to provide for more than what the legislature has prescribed.

The Washington Secretary of State accordingly requests that this Court deny the petitioners' motion, and allow the upcoming hand recount to promptly proceed without litigation uncertainty or delays so the People of our State can have a closure to this statutory recount process.

II. ISSUES ADDRESSED

The "Summary Of Analysis" section of petitioners' motion specifies the emergency relief petitioners seek – namely:

(1) "an Order from this Court requiring that the pending hand recount include a consideration of all votes cast, including those rejected by canvassing boards or their subordinates during the initial count", and that this Court's Order include "standards that ensure that all ballots rejected in previous counts are fully canvassed so that the hand recount produces as complete and accurate a tabulation as possible, [and] standards for evaluating previously-rejected signatures according to the more liberal standards applied in most counties"; and

(2) "that this Court Order the Secretary of State to issue uniform statewide rules for the conduct and procedure of the hand recount consistent with the rights of observation and challenge and sufficient to ensure that all votes are counted", with "standards that allow party representatives to meaningfully witness the hand recount, by observing all actual ballots being counted."

Petitioners' Motion at pages 7 – 8.

As the rest of this Response explains, the legal authority petitioners invoke does not support the above relief they request.

III. STATEMENT OF THE CASE

A. Washington Law In Place Before The November 2, 2004 Election.

1. Statewide Standards are Set Forth in the Washington Elections Statute and Washington Administrative Code.

As Part IV of this Response sets forth in more detail, the Washington elections statute (Title 29A RCW) prescribes statewide standards and rules with respect to the conduct of elections in our State.

The Washington elections statute also provides for the Secretary of State to make "reasonable rules in accordance with chapter 34.05 RCW [the Administrative Procedures Act] ... to effectuate any provision of this title and to facilitate the execution of its provisions in an orderly, timely, and uniform manner". RCW 29A.04.610, .611. Pursuant to that authority, the Secretary of State has promulgated a large volume of statewide standards and rules concerning the conduct of elections in our State (see Title 434 WAC). As Part IV of this Response also explains, the WAC provisions at issue in this case were so promulgated before the November 2, 2004 election.

The recount guidelines that the petitioners' motion refers to as "final rules" issued or adopted by the Secretary of State, however, were not rules promulgated, issued, or adopted as the petitioners' suggest. Indeed, those guidelines expressly stated that they were not new law, that they did not in any way change the statewide standards established before

the election, and that they were merely a recitation of current law to assist the County Auditors.[1]

2. Election "Canvassing" and County Canvassing Boards.

The Washington elections statute defines "canvassing" as follows:

> "Canvassing" means the process of examining ballots or groups of ballots, subtotals, and cumulative totals in order to determine the official returns of a primary or general election and includes the tabulation of any votes that were not tabulated at the precinct or in a counting center on the day of the primary or election.

RCW 29A.04.013.

The Washington elections statute assigns to county canvassing boards the duties of so canvassing election results and, in the event of a recount, retabulating ballots and producing amended election returns based on that retabulation. RCW 29A.60.140, 29A.64.041. Each county's canvassing board consists of the following three persons (or their designees): the County Auditor, the County Prosecuting Attorney, and the chair of the County's legislative body. RCW 29A.60.140.

A court can compel a canvassing board to make a canvass of the returns or conduct a recount, but can go no further in directing how the canvassing board shall act as long as it proceeds according to the directions of the statute. *Morris v. Board of County Commissioners of Asotin County*, 195 Wash. 173, 177-178, 80 P.2d 414 (1938) ("The court is without power to inquire into the [canvassing] boards' manner in arriving at the result").

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[1] *Declaration Of Jeffery Richard, Exhibit A.*

Although the Secretary of State certifies the results of the election to the Governor, Legislature, and the public (RCW 29A.60.250), the Secretary of State does not intervene, approve, or disapprove the decisions of the county canvassing boards.

3. Election "Recounts".

The Washington elections statute defines a "recount" as follows:

> "Recount" means the process of retabulating ballots and producing amended election returns based on that retabulation, even if the vote totals have not changed.

RCW 29A.04.139.

Since "recount" is prescribed by statute to be narrower than "canvassing", the recounts conducted in prior years under the Washington elections statute have not entailed a recanvassing of the election.[2] Thus, as the declaration submissions filed with this Response explain, the historical recount practice under our State's elections statute has been to not conduct canvassing activities such as a wholesale re-examination of ballot signatures previously submitted to and ruled upon by the county canvassing boards.[3]

B. The November 2, 2004 Election.

The general election in our State was held on November 2, 2004. The Secretary of State certified the results of that election on November 17.

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[2] *Declaration Of Jeffery Richard, Exhibit B.*

[3] *Declaration Of Jeffery Richard, Exhibit B.*

The margin separating the two top candidates for Governor triggered an automatic machine recount under chapter 29A.64 RCW, and the Secretary of State certified the results of that machine recount on November 30.

On December 3 one of the petitioners in this action requested a hand recount, and pursuant to the schedule that the Secretary of State had been previously announced to the political parties and all County Auditors, the Secretary of State issued the recount directive on December 6.[4]

The Secretary of State advised the County Auditors of the petitioners' Motion and the initial indication in the email this Court sent with its December 3 briefing Order that indicated a hearing might be held on petitioners' Motion December 8 or 9, and requested that the counties not commence the actual process of recounting the ballots until December 9 (the end of the 3-day delay allowed by statute for the counties to commence the recount). As of the time this Response is being typed, the Secretary of State has been informed by some counties that they will be commencing on December 8, and others that they will delay until December 9.[5]

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[4] *Declaration Of Jeffery Richard, Exhibit A.*

[5] *Declaration Of Jeffery Richard, Exhibit A.*

IV. LEGAL DISCUSSION

A. Petitioners' Claims Must Be Dismissed Because New Or Different Rules Cannot Now Be Issued To Govern The November 2 Election.

Washington law authorizes the Secretary of State to promulgate statewide rules before an election is held to facilitate the County Auditors' conduct of that election. See *O'Connell v. Meyers*, 51 Wn.2d 454, 460, 319 P.2d 828 (1957) (Secretary of State's statutory duties must be performed prior to the election).

And in this case, that is precisely what the Secretary of State did. For example, promulgating WAC provisions requiring the signature on a provisional ballot to "match" the signature on file with the County Auditor.[6] Such rules promulgated in accordance with the Washington Administrative Procedures Act supplemented the election requirements prescribed by the legislature in Title 29A RCW.

The *Bush v. Gore* case petitioners invoke for their constitutional argument confirms that a State Supreme Court cannot now change those rules or impose new rules to govern the counting of the previously cast November 2 ballots. As Chief Justice Rehnquist's opinion in support of the Court's ruling explained when discussing the new "undervote" counting practice which the Florida Supreme Court had added to supplement the Florida Secretary of State's pre-election practices:

> For the [Florida Supreme] court to step away from this established practice, prescribed by the Secretary, the state official charged by the legislature with "responsibility to ...

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[6] *WAC 434-253-047 (as amended by emergency rule WRS 04-18-028, effective August 24, 2004).*

> obtain and maintain uniformity in the application, operation, and interpretation of the election laws," ... was to depart from the legislative scheme.

531 U.S. at 120.

Petitioners' demand that this Court now create new or different rules to govern the tabulation of last November's election similarly depart improperly from the Washington election statute's legislative scheme.

Indeed, the Court's injection of such new rules at this point would not only depart from the Washington election statute's legislative scheme – it would violate it. That is because Washington's election statute provides that after the ballots are cast in an election, it is the county canvassing board's role to examine the ballots and tabulate the votes under the law existing at the time those ballots were cast. See Part III.A.2 of this Response above.

If someone believes that there is an inconsistency or discrepancy in the way the county canvassing board is tabulating any particular ballot in the performance of that function, that person must timely bring the alleged inconsistency or discrepancy to the county canvassing board's attention so it can, pursuant to the safety valve provided by RCW 29A.60.210, correct any error the canvassing board finds with respect to that particular ballot before the county canvassing board certifies the results of its tabulation of its county's election results. Under our State's elections laws, that person cannot instead run to this Court demanding that every county canvassing

board undertake a wholesale recanvassing of all ballots cast in the election.[7]

B. Petitioners' Claims Must Be Dismissed Because A "Recount" Is *Not* A Re-examination Of Every Ballot.

1. Petitioners have no *statutory* basis for their wholesale re-evaluation demand.

The legal authority upon which petitioners rely confirms that the right to vote as the legislature has prescribed is fundamental,[8] and that since the right to a recount did not exist at common law, the grant of the right lies within the discretion of the legislature."[9] In short, the upcoming hand recount at issue in this case is purely statutory. See also, e.g., *State v. Superior Court of King County*, 113 Wn. 54, 57, 193 p. 226 (1920) (right to vote is constitutional right, but manner in which franchise is to be exercises is purely statutory); *Quigley v. Phelps*, 74 Wash. 73, 85, 132 P. 738 (1913) (in the absence of statutory authority, where election officers have performed their duty in counting the ballots and have certified their return indicating the result of the election, they are without authority thereafter to do any act that would operate to change the result originally announced by them).

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[7] *Respondent further notes that petitioners' claim that this Court has proper mandamus jurisdiction in this case (Petitioners' Motion at 9 & n.2) is misplaced, for the mandamus "order" petitioners demand is not ministerial in nature.*

[8] *Petitioners' Motion at 10 (quoting from Bush v. Gore, 531 U.S. 98, 104, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000), that "the right to vote as the legislature has prescribed is fundamental") (emphasis added).*

[9] *Petitioners' Motion at 14 cites §289 of the CJS Elections treatise. That §289 confirms that "The right to a recount and contest of the ballots cast at an election did not exist at common law, and the grant of the right lies within the discretion of the legislature." CJS Elections, §289 (emphasis added).*

The statutory basis for recounts is fatal to petitioners' demand that the upcoming hand recount include a re-examination of every ballot – for the Washington election statute provides that a "recount" is merely a re-tabulation of the ballots, not a re-evaluation of them.

Our election statute defines "canvassing" relatively broadly to encompass both the examination of ballots *and* the tabulation of their votes:

> "Canvassing" means the process of examining ballots or groups of ballots, subtotals, and cumulative totals in order to determine the official returns of a primary or general election and includes the tabulation of any votes that were not tabulated at the precinct or in a counting center on the day of the primary or election.

RCW 29A.04.013.

In contrast, our election statute defines a "recount" much more narrowly, specifying that a recount is merely the retabulation of ballots:

> "Recount" means the process of retabulating ballots and producing amended election returns based on that retabulation, even if the vote totals have not changed.

RCW 29A.04.139.

The fact that "canvassing" and "counting" are not the same is further recognized throughout the Washington elections statute. E.g., RCW 29A.04.019 (describing county counting centers as the facility designated to "*count* and *canvass*" ballots); RCW 29A.64.070 ("After the original *count*, *canvass*, and certification of results, the votes cast in any single precinct may not be *recounted* and their results recertified more than twice").

Washington's election statute simply is not the same as the statutes of other States noted in petitioners' brief which provide for a recanvass or re-evaluation of the ballots instead of a just a recount. For example:

- the West Virginia recount statute cited by petitioners states that "the ballots and ballot cards shall be reexamined during such recount";[10]
- the Illinois recount statute they cite requires not just a retabulation, but also that ballots previously marked as rejected "shall be examined to determine the propriety of such labels";[11] and
- the Wisconsin recount statute they cite requires not just a retabulation of votes, but that "In addition, the board of canvassers ... shall examine the ballots marked 'rejected', 'defective' and 'objected to' to determine the propriety of such labels".[12]

Petitioners' invocation of out-of-State cases to argue that Washington's recount statute should be "liberally" construed simply cannot change the fundamental fact that the Washington recount statute does not include a re-examination of ballots as part of a recount, and this Court cannot re-write the Washington statute to add the ballot re-examination provisions that petitioners like in other State's statutes.[13]

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[10] *W.Va.Code §3-4A-28(3) (2004), as cited at page 15 of Petitioners' Motion.*

[11] *Ill. Comp Stat. §5/24A-15/1 (2004), as cited at pages 14-15 of Petitioners' Motion.*

[12] *Wis. Stat. §5.90 (2004), cited at page 15 of Petitioners' Motion.*

[13] *Petitioners' cases from other States are also inapplicable to this situation for other reasons as well.*

For example, petitioners cite Braxton v. Holmes County Election Canvassing Board, 870 So.2d 958 (Fla. Dist. Ct. App. 2004), for the proposition that reconsideration of ballots rejected by the canvassing board because of signature issues is permitted in a recount. However, Braxton was not a recount case. It was an election challenge case, and under Florida law, "rejection of a number of legal votes sufficient to change or place in doubt the result of the election, is grounds for contesting the results of an election. Fla. Stat. Section 102.168(3)(c) (2000).

As another example, petitioners cite to two out of state cases for their assertion that recount procedures must be construed liberally. But neither case pertained to the scope

2. Petitioners' *constitutional* argument does not provide a basis for their wholesale re-evaluation demand.

Petitioners allege they have identified what they believe are instances of inconsistencies, discrepancies, and errors, and then argue those inconsistencies, discrepancies, and errors prove there is not a uniform standard for the evaluation of ballots in Washington. Invoking the equal protection theme of *Bush v. Gore*, petitioners argue that a blanket re-examination of every ballot is therefore required as a ***constitutional*** matter because the federal and Washington State constitutions require a uniform standard for the evaluation of ballots.

As an initial matter, this Respondent notes that petitioners' citation of *Brower v. State*, 137 Wn.2d 44, 969 P.2d 45 (1998), at page 11 of their brief does not support their suggestion that the Washington Constitution grants greater equal protection rights in this context than the federal constitution's equal protection rights recognized in *Bush v. Gore*. And as explained below, petitioners' constitutional argument under that case's equal protection ruling fails.

Petitioners' essential equal protection premise is that Washington did not have uniform statewide standards for the examination of ballots as part of the county canvassing boards' canvassing of the November 2 election. But that premise is not accurate.

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of counting or canvassing under which a recount would operate. State ex rel. Thomas v. District Court, 154 P.2d 980, 981 (Mont. 1945), pertained simply to whether the court should grant or deny the application for recount. And Dowden v. Benham, 234 Ind. 103 (1955), was an election contest challenging the results of an election.

For example, the Washington election statute provided a single, uniform statewide standard for accepting the signature on an absentee ballot – i.e., the ballot signature must be the "same as" the one on file:

> Before opening a returned absentee ballot, the canvassing board or its designated representatives ... shall verify that the voter's signature on the return envelop is the same as the signature of that voter in the registration files of the county.

RCW 29A.40.110.

And the Washington Administrative Code provided a single, uniform statewide standard for accepting the signature on a provisional ballot – i.e., the ballot signature must "match" the one on file:

> A provisional ballot cannot be counted unless the voter's ... signature ... matches a voter registration record.

WAC 434-253-047 (as amended by emergency rule WRS 04-18-028, effective August 24, 2004).

Petitioners argue that the "match" requirement for provisional ballot signatures could not have constituted a uniform standard because different counties had different rejection rates under that "match" standard. And petitioners suggest a similar argument against the "same as" requirement for absentee ballot signatures based on different counties' differing rejection rates.

But different county canvassing boards' reaching different conclusions does not prove that the Washington elections law provided the canvassing boards with no statewide standard. It simply means they reached different conclusions. And despite petitioners' complaints about King County employing a signature verification system that they assert is

not as lax other counties, petitioners do not identify instances where King County's signature verification system caused a valid ballot to be rejected.

(a) Uniform rule does not require identical results.

Having a sufficiently uniform rule to comply with constitutional equal protection concerns does not require identical results.

For example, the fact that a trial court in one county imposes a different sentence under the Washington Sentencing Reform Act than the sentence imposed by the trial court in another county does not mean that Washington lacks a uniform standard compliant with constitutional equal protection concerns. See *State v. Oksoktaruk*, 70 Wn. App. 768, 776-77, 856 P.2d 1099 (1993) (there is no constitutional requirement that defendants with the exact same "offender score" convicted under similar circumstances must also receive the same sentence, for sentencing disparities between similar crimes do not implicate equal protection).

The "accident of geography" cases in the citizenship/naturalization context provides another example of how different results do not establish the lack of a uniform rule compliant with equal protection. Although the law requires a uniform federal standard for naturalization must apply with equal force in every state, that uniformity rule only requires the same general standard be applied – it does not require the same result. *Nehme v. Immigration and Naturalization Service*, 252 F.3d 415, 429 (5th Cir. 2001). Therefore, a person living in one State may be entitled to naturalization whereas that same person living in another State would not be entitled to naturalization simply because that accident of geography –

for "the Constitution simply requires Congress to enact rules of naturalization that apply uniformly throughout the United States, even though those uniform federal rules may produce results that differ by state." 252 F.3d at 429. See also *In re Lee Wee*, 143 F. Supp. 736, 737-38 (S.D. Cal. 1956) (discussing the "good moral character" requirement for citizenship, and holding that the law was uniform even though a person who lived in a city where gambling was permitted might be entitled to naturalization, whereas in another city in the same State, gambling could result in a criminal conviction and a denial of citizenship).

In short, petitioners' contention that they believe different counties arrive at different results in similar situations does not refute the dispositive fact that Title 29A RCW and Title 434 WAC provide sufficiently uniform elections standards as far as the equal protection clause is concerned.

(b) Petitioners' signature rejection rate argument does not implicate equal protection clause.

Petitioners' complaint that different counties have a different verification system for "matching" signatures does not rise to an equal protection violation under petitioners' own case precedent of *Bush v. Gore* – for in that case the U.S. Supreme Court specifically noted that its ruling was not addressing the question of "whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." 531 U.S. at 109. See also 531 U.S. at 147 (Justice Breyer's discussion noting that punch-card systems failed to read a vote on the

ballot 1.53% of the time, while optical scan systems failed to read a vote on the ballot only 0.3% of the time – and noting those differing results did not rise to the level of an equal protection violation even though "the ballots of voters in counties that use punchcard systems are more likely to be disqualified than those in counties using optical-scanning systems").

Case law after *Bush v. Gore* has thus confirmed that different counties having different systems that result in a different rejection rate for ballots does not raise a sufficient equal protection claim for court intervention.

Much like the petitioners in this case, the plaintiffs in the Gray Davis Recall case complained that different counties had different systems which resulted in some counties rejecting far more votes than other counties. Specifically, plaintiffs noted that California counties using a punch-card system rejected 2.23% of ballots cast, which was twice the rejection rate experienced by areas using other systems. *Southwest Voter Registration Education Project v Secretary of State Shelley*, 344 F.3d 914, 917 (9th Cir. 2003).

Plaintiffs claimed an equal protection violation because voters in counties that used one system (punch-cards) had a clearly lower chance of having their votes counted than voters in counties that used other systems. *Id.* But the Ninth Circuit explained that *Bush v. Gore* did not prohibit local entities from developing different systems for implementing elections, and thus rejected plaintiffs' demand that the court intercede on equal protection grounds. *Id.* Cf. *Graham v. Reid*, 779 N.E.2d 391, 395,

334 Ill. App.3d 1017 (2002) (ballots in one precinct not being counted because they were missing did not violate the equal protection rights of that precinct's voters).

The same conclusion applies here. Even if petitioners established that the difference in rejection rates they complain about was caused by Washington counties' using different systems for verifying a signature "match" (instead of being caused by other likely variables[14]), such a difference in rejection rates due to the local jurisdictions' developing different systems for signature verification still would not implicate the equal protection ruling in *Bush v. Gore*.

(c) Washington law holds that different results do not implicate equal protection absent an improper intent to discriminate

Washington law further confirms that even if petitioners had proven that the counties having different signature verification systems caused the different rejection rates they complain about, that different result would not rise to the level of an equal protection violation unless petitioners also proved some improper intent to discriminate between the "accepted" and "rejected" voters.

For example, the taxpayers in *Carkonen v. Williams*, 76 Wn.2d 617, 458 P.2d 280 (1969), alleged that the cyclical property tax assessment system used by King and Snohomish counties lacked uniformity within and between the two counties, thereby giving rise to unequal and

[14] *Such other variables are noted at Declaration Of Jeffery Richard, Exhibit C.*

nonuniform tax exactions in violation of the equal protection clauses of the federal and state constitutions.

The unequal and nonuniform result inherent in such cyclical systems was not disputable. This Court nonetheless rejected the taxpayers' equal protection claim, concluding that "state courts which have considered cyclical revaluation programs have generally found them to be compatible with constitutional equal protection and uniformity provisions, provided that they be carried out systematically and without intentional discrimination." 76 Wn.2d at 633.

As this Court further explained that "the assessors involved were honestly endeavoring to pursue a systematic nondiscriminatory cyclical approach to revaluation", and that the "sheer physical problem of annually inspecting the units of property involved, coupled with the staff and budgetary allocations required to accomplish such, lend wisdom to the legislative act authorizing and directing a cyclical approach, and virtually lays to rest any viable claim to intentional discrimination inhering in the system." 76 Wn.2d at 632.

Here, petitioners do not even allege – never mind establish – any such intentional discrimination inhering in the differing signature verification systems they complain about. Their equal protection argument accordingly does not justify the extraordinary Court intervention that petitioners demand.

(d) Canvassing boards can address particular, timely raised errors

To the extent petitioners timely brought forward evidence of an unlawful inconsistency or error with respect to any particular ballot, the Washington elections statute provided a safety valve for the appropriate county's canvassing board to correct such an error, expressly providing that:

> Whenever the canvassing board finds that there is an apparent discrepancy or an inconsistency in the returns of a primary or election, the board may recanvass the ballots or voting devices in any precincts of the county. The canvassing board shall conduct any necessary recanvass activity on or before the last day to certify the primary or election and correct any error and document the correction of any error that it finds.

RCA 29A.60.210.

Especially in light of that additional safeguard, petitioners cannot in this case establish the constitutional basis they claim for this Court to step in and rewrite the Washington elections statute to change its provision for a "recount" to instead provide for a wholesale "reevaluation" and "recanvassing" of all ballots instead.

C. Petitioners' Claims Must Be Dismissed Because Washington Law Does Not Allow Each Party's Observers To Lodge Objections During Their Observation Of The Ballots And Tabulation.

The Washington elections statute allows witnesses in a recount to "observe the ballots and the process of tabulating the votes". RCW 29A.64.041(1).

Like the Washington Open Public Meetings Act, however, that statutory right does not also include a right to "be heard" or participate in

the process being observed. See chapter 42.30 RCW (the Open Public Meetings Act).[15]

The petitioners, moreover, have not identified any county that plans to refuse to allow the petitioners' observers to communicate with or "be heard" by the county's supervisory personnel involved in the upcoming recount.

In short, petitioners' motion does not provide any statutory or constitutional authority for this Court to now re-write the Washington elections statute to add provisions or privileges beyond the parties' statutory right to observe as prescribed in RCW 29A.64.041.

V. CONCLUSION

The right to a recount is prescribed by the statute creating that right. And Washington's statute limits recounts to a recount – not the reexamination or recanvassing of all ballots as petitioners demand.

Washington's recount statute is thus narrower than the recount statutes of other States. And as the Washington legislature has confirmed, our recount statute's more limited process is designed to strike what the legislature determined to be the appropriate balance for a proper and expeditious closure to close election contests:

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[15] *The Open Public Meetings Act does not guarantee the right of the public to* ***participate*** *at the meeting attended – it only guarantees that the public can attend. See 4 E. McQuillin,* The Law of Municipal Corporations *§13.07 (3rd Ed. 2002); Lysogorski v. Charter Township of Bridgeport, 662 N.W.2d 108, 110, 256 Mich.App. 297 (2003) ("The public's right to attend a meeting of a public body is limited to the right to observe and hear the proceedings so that they may be informed of the manner in which decisions affecting them as citizens are made").*

> The legislature finds that it is in the public interest to determine the winner of close contests for elective offices as expeditiously and as accurately as possible. It is the purpose of this act to provide procedures which promote the prompt and accurate recounting of votes for elective offices and which provide closure to the recount process.

Laws of 1991, chapter 90, §1.

The provisions accordingly enacted by the Washington legislature provide for a "recount" (not a "recanvass" or "reexamination") of the ballots, and provide for the political parties' witnesses to observe (not lodge objections to) the ballots as they are being recounted. Neither the Washington elections statute nor the *Bush v. Gore* equal protection argument petitioners raise justify petitioners' demand that this Court issue an Order that effectively re-writes the Washington elections statute to provide for something other than what the Washington legislature has deliberately prescribed.

The Washington Secretary of State accordingly requests that this Court deny petitioners' motion, dismiss petitioners' suit, and allow the upcoming hand recount to promptly proceed without litigation uncertainties and delays so the People of our State can have closure to this recount process.

RESPECTFULLY SUBMITTED this 7th day of December, 2004.

Foster Pepper & Shefelman PLLC
SPECIAL ASSISTANT ATTORNEYS GENERAL*

Thomas F. Ahearne, WSBA No. 14844
Jeffery A. Richard, WSBA No. 28219
Hugh D. Spitzer, WSBA No. 5827
Marco J. Magnano, WSBA No. 1293

Attorneys for Respondent Secretary of State Sam Reed

**Since the current Attorney General is one of the candidates in the election being recounted, the above private counsel (instead of the Attorney General's office) is representing the Secretary of State in this matter*